Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1850

JOHN SEEKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOHN SEEKINS, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on March 2, 1977.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix A, infra, p. i) was not reported. The opinion of the District Court below was not reported.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was made and entered on March 2, 1977, and a copy thereof is appended to this Petition in the Appendix A at p. i. Petition for a re-hearing was denied on May 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is the Petitioner entitled to a new trial in accordance with Rule 33 of the Federal Rules of Criminal Procedure, based on newly discovered evidence and essential to the interests of justice?

2. Is the Petitioner entitled to a new trial based on the reasonable possibility of prejudice to Petitioner engendered by Respondent's failure to offer proof in compliance with the grand jury indictment in regard to the place where the alleged offense occurred?

FEDERAL RULES AND REGULATIONS INVOLVED

Involved herein is Rule 33 of the Federal Rules of Criminal Procedure, which reads as follows:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the Court without a jury, the Court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven (7) days after verdict or finding of guilty or within such further time as the court may fix during the seven-day period." 18 U.S.C. 33.

STATEMENT

On January 14, 1976, a grand jury indictment was issued, charging Petitioner with possession of and dealing in counterfeit currency, under Sections 472 and 473 of 18 U.S.C. The indictment specified Campbell, California as the situs of the alleged criminal activity.

At trial in the United States District Court in and for the Northern District of California, the prosecution proceeded on the theory, and entered evidence to the effect, that the alleged criminal activity took place not in Campbell, California, but some fifty miles north, in San Francisco, California. Notification to defense of this drastic variance came less than one week before trial, and never, at any time, did the prosecution seek to amend the indictment so as to effectuate conformance with the proof offered at trial.

At trial, the chief prosecution witness, Percy Johnson, testified that he received counterfeit currency from Petitioner. Johnson also testified that he did not know either Jerry Leyman or Danny Migdal, two men who were known by the authorities to be counterfeiters, with the possibility that they might have been in possession of the same series of counterfeit currency with which Petitioner was charged of possession.

After the close of the trial, it was discovered that Percy Johnson did, in fact, know both Leyman and Migdal. This information would serve both to impeach Johnson and to offer an alternative theory as to who supplied Johnson with the counterfeit currency.

Based on this newly discovered evidence, and on the possibility of prejudice to Petitioner due to the variance described herein, Petitioner entered a motion for a new trial before the District Court on May 28, 1976. The motion was denied on July 6, 1976, and the Court of Appeal affirmed this denial on March 2, 1977.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit of the Court of Appeals clearly demands review by this Court. The ruling of the Ninth Circuit is one which has "sanctioned such a departure

(from the accepted and usual course of judicial proceedings) by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 19, US. Supreme Court Rules).

The usual course of judicial proceedings, as based on Rule 33 of the Federal Rules of Criminal Procedure should have entitled Petitioner to a new trial. Rule 33 expressly states that "the interests of justice" shall be the determinative factor in granting a new trial on the motion of defendant.

I. The rule makes special provisions for such a motion if based on newly discovered evidence, in that the motion can be made within two years after the verdict. Normally, such a motion for a new trial based on newly discovered evidence and made within the two-year period must meet a number of requirements. See 8A Moore's *Federal Practice* § 3303 (1976).

It has been firmly established, however, that where defendant's motion for a new trial based on newly discovered evidence is made within the seven-day period following the verdict, the *sole* standard governing its disposition is the interest of justice. *Brodie v. United States* 295 F.2d 157, 159, 160 (1961); *Carr v. District of Columbia* 543 F.2d 909, 976 (1976).

Bearing this in mind, Petitioner contends that the denial of his motion for a new trial by the trial judge in the United States District Court in and for the Northern District of California constituted a clear departure from the accepted and usual course of judicial proceedings and was wrongly sanctioned by the Circuit Court of Appeals.

Since the interest of justice is the standard by which the trial judge was bound to rule on Petitioner's motion for a new trial, the trial judge was required to invoke his discretionary power (*Brodie v. United States*, supra.). The

denial of the motion was a clear abuse of this discretionary power in that Petitioner was denied the opportunity to present newly discovered evidence which by the obvious inference which can be drawn from this evidence, might have created more than a reasonable doubt in the minds of the jurors as to Petitioner's guilt.

The newly discovered evidence as to a connection between the chief prosecution witness, Percy Johnson, and two known counterfeiters, Jerry Leyman and Danny Migdal, would serve not only to impeach Johnson, but also to present an alternate theory as to the means by which Johnson came into possession of the counterfeit bills allegedly supplied by Petitioner. Either or both of these facts would have materially affected the jury's deliberations.

Petitioner's motion for a new trial based on newly discovered evidence, (see Appendix "B" p. iii) contained the essential characteristic of such a motion, i.e. ". . . a disclosure of evidence portraying the movant's claim materially and resolutely, and evincing a capability of mounting a serious challenge." *Carr v. District of Columbia*, supra, at p. 916. Thus, Petitioner asserts that the District Court Judge abused his discretion in dismissing Petitioner's motion, and the Circuit Court's subsequent affirmation of this denial constituted the type of sanction which Rule 19 of the United States Supreme Court Rules declares as warranting discretionary review by this Court.

II. Again, the District Court Judge abused his discretion in denying the motion for a new trial based on variance between the grand jury indictment of Petitioner and the proof offered at trial. As the facts set forth herein indicate, Petitioner was indicted for a crime which he was alleged to have committed in Campbell, California. At trial, Re-

spondent offered proof as to a crime allegedly committed in San Francisco, California.

The Circuit Court, in justifying its affirmation of the new-trial denial, relied on the holding in *Berger v. United States* 295 U.S. 78 (1935). The holding in this case set forth a high standard for the determination of whether or not variance demanded a new trial, that standard requiring that the variance "affect the substantial rights of the accused." *Berger, supra,* at p. 82.

Petitioner contends, however, that it is the modified standard for granting a new trial based on variance, as set forth in *Jackson v. United States* 359 F.2d 260 (1966), which should be applied herein. The *Jackson* standard is based on the "*reasonable possibility* of prejudice" (emphasis added) to the defendant, and does not require a showing that the variance affected the substantial rights of the accused. Indeed, the *Jackson* case states:

> "If there is a timely objection a variance may be fatal even though defendant cannot affirmatively demonstrate actual prejudice." (*Jackson, supra* at p. 264).

This ground for a new trial "merits respectful consideration, unless there is no reasonable possibility of prejudice." (*Jackson, supra,* at p. 265).

A timely objection to the variance was made by Petitioner at the conclusion of Respondent's case against him. Thus, in order to invoke the *Jackson* standard for a new trial, Petitioner need merely have shown that this variance created a reasonable possibility of prejudice to his case.

It appears clear that such a possibility of prejudice did, in fact, exist. Preparation of Petitioner's defense was gravely impaired by the fact that defense counsel had slight opportunity to familiarize himself with the geographic and chronological elements of the alleged "San Francisco

criminal activity." Subsequent to the government's verbal notification of the change in location of the alleged criminal activity, defense counsel had less than one week to re-investigate and restructure its defense strategy. Petitioner's alibi, his primary defense to the charge set forth in the indictment, was drastically affected by this change and invaluable time, effort and work-product was lost by defense.

The Court of Appeals, in its affirmation of the order denying a new trial, appears to ignore the extensive possibility of prejudice to Petitioner which was created by the prosecution's failure to conform proof offered to the facts as stated in the indictment. The Court of Appeals has erred in two respects:

1) It has incorrectly applied the rigorous *Berger* standard regarding variance (supra,) and 2) the Court has grieviously underestimated the effect which the vast variance involved herein had on Petitioner's ability to adequately prepare a defense.

In so affirming, the Court of Appeals has sanctioned the District Court's departure from the usual course of judicial proceedings, and the sanctioning of such a departure calls for the exercise of this Court's supervisory powers.

CONCLUSION

Thus, for the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Dated: June 8, 1977.

ESHOO, DUBOIS & SCOTT

By GEORGE P. ESHOO
George P. Eshoo
Counsel for Petitioner

(Appendices Follow)

Appendix A

Do Not Publish

United States Court of Appeals
for the Ninth Circuit

No. 76-2739

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN SEEKINS,
Defendant-Appellant.

MEMORANDUM
[March 2, 1977]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and ELY, Circuit Judges,
and BELLONI,* District Judge.

The denial of Seekins' motion for a new trial, grounded on newly discovered evidence, was proper. We need not decide whether to apply the broad "in the interest of justice" standard urged by Seekins and followed by the District of Columbia Circuit in *Brodie v. United States,* D.C. Cir., 1961, 295 F.2d 157, or the more stringent standard usually required for motions for new trials based on newly discovered evidence. *See* 8A Moore's FEDERAL PRACTICE, ¶ 33.03 (1976). Under either standard, Seekins' challenge is without merit. The decision to order a new trial rests with the sound discretion of the trial judge, and the district

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*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

court properly exercised that discretion in this case. *United States v. Harris,* 9 Cir., 1976, 534 F.2d 1371, 1373; *United States v. Granger,* 9 Cir., 1974, 504 F.2d 585; *United States v. Craft,* 9 Cir., 1970, 421 F.2d 693, 695.

What Seekins claims was "newly discovered evidence" consisted of a "connection" between two men, Leyman and Migdal, who knew two key prosecution witnesses, Powell and Johnson. Yet Seekins offers no evidence explaining how that "connection" has any relevance to his case, and he never explains what testimony might be given that would help his defense. Moreover, part of the evidence was not "newly" discovered because Seekins knew about Leyman, at least, before the trial. It was immediately after the trial that he suddenly "remembered" the connection.

There is a variance between the place of the offense stated in the indictment, Campbell, California, and the place proved at trial, San Francisco, about fifty miles north of Campbell. The government has not explained why it failed to correct the discrepancy in a superseding indictment. Despite that, "[t]he true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger v. United States,* 1935, 295 U.S. 78, 82. The government orally told Seekins' attorney about the variance one week before trial. Seekins' attorney never offered that as a basis for a motion for a continuance. Now Seekins claims that the late notice changing the alleged location of the crime placed his attorney "at a severe disadvantage in his pretrial preparation," but he never explains why.

Affirmed.

Appendix B

Law Office of George P. Eshoo
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Telephone 364-7030
Attorney for John Seekins

In the United States District Court for the Northern District of the State of California

NO CR 76 22 RFP SJ

United States of America *Plaintiff*

vs

John Seekins *Defendant*

NOTICE OF APPEAL

Notice Is Hereby Given that John Seekins, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment of conviction and from the denial of the motion for new trial entered in this proceeding on the 6th day of July, 1976.

Dated: July 6, 1976.

Law Office of George Eshoo

George P. Eshoo

Law Office of George P. Eshoo
500 Allerton Suite 102
Redwood City, CA.
Telephone 364-7030
Attorney for John Seekins

Original Filed May 28 1976
Clerk, U.S. Dist. Court
San Jose

In the United States District Court for the Northern District of the State of California

NO CR 76 22 RFP SJ

United States of America
Plaintiff

vs

John Seekins
Defendant

NOTICE OF MOTION FOR NEW TRIAL

To: Honorable Robert Schnacke, Clerk of the Federal District Court, United States Attorney

Notice Is Hereby Given that on 6-18-76 9:30 or as soon thereafter as the matter can be heard, defendant will move the court for an order granting a new trial.

The motion will be based on this Notice, on the Declarations of George P. Eshoo and John Seekins and the Points and Authorities served and filed herewith, and all the papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing of this motion.

Dated: May 28, 1976.

Law Office of George P. Eshoo

GEORGE P. ESHOO

POINTS AND AUTHORITIES

I

A NEW TRIAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE OF THE DISCOVERY OF NEW EVIDENCE

Federal Rule of Criminal Procedure 33 provides that the court may grant a new trial in the interest of justice.

One of the compelling grounds for this is the discovery of new evidence. While there are stringent rules placing a heavy burden on the movant when the motion is made greater than seven days after the verdict, this is NOT so when it is made within such period. At this point the court only need feel it is in the *interest of justice. Wright,* Federal Practice and Procedure § 557. It has been said "the court sits as a thirteenth juror." *Brodie v. U.S.* C.A. 1961, 296 Fed. 157, 159.

When such a motion is made within seven days of conviction, the grounds of newly discovered evidence should be viewed as one which invoked *broad discretionary powers* of the court, and should *not* have been considered on *narrow standards* of *due diligence. Brodie v. U.S. supra.*

In the instant case, the prosecution tried to establish that defendant had a direct link with Percy Johnson and that Percy Johnson did not know Powell or Burt Paine.

After completion of the trial and while awaiting the jury, defendant was viewing individuals who had passed the *same* counterfeit bills and noticed on the list that one Leyman had been incarcerated with Percy Johnson and also the same individual knew Jim Powell; Leyman had been incarcerated with Powell.

Defendant did not make this mental connection until the jury was out. Clearly, if defendant had realized this con-

nection, the defendant would have subpoened Leyman and would have asked Powell and Johnson if they knew or had connection with Leyman.

Furthermore, after defendant remembered the Leyman connection, he remembered that Danny Migdal also had a connection with Jim Powell and Percy Johnson. Migdal was incarcerated with Powell and Johnson and he would have been called to testify.

Again, it is noted that when this motion is brought within seven days of the verdict, usual stringent rules for granting the motion are not applied. The issue is the interest of justice.

This new evidence, the existence of the other individuals linking the main witness, Percy Johnson with Jim Powell and Leyman, who had also passed or had access to the subject bills must be considered material to the issues in the present case.

It is urged that adequate diligence was used by counsel and defendant for purposes of this motion. Under the strict test, diligence is determined from the composite knowledge and conduct of both the accused and his counsel. All that is required is ordinary diligence, not the highest degree of diligence. *Wright,* Fed. Practice & Procedure, § 557, ff 15-16.

Counsel had no way of knowing the need to subpoena these individuals until the connection was made. Under the strict test all that is needed is ordinary diligence. The fact that the defendant in the instant case did not make the connection at issue here is not a failure of due diligence. Not being a lawyer or necessarily one who would readily recognize the proof of value of such a connection, he should not be held to a high standard as is noted above. This is especially so because this motion is being made as soon as possible after the verdict and within the seven day period for a Rule 33 motion.

II

IN THE INTEREST OF JUSTICE A NEW TRIAL SHOULD BE ORDERED BECAUSE OF DEFENSE COUNSEL'S INABILITY TO PREPARE BECAUSE OF THE QUALITY OF THE TAPE RECORDING'S SUPPLIED BY THE PROSECUTION.

In the instant case, a discovery order was obtained, however, the tapes supplied to defendant's counsel were very difficult to decipher. The quality of the tapes greatly impeded counsel's ability to prepare.

Rule 33 involves granting a new trial where that would serve the interests of justice. This recognizes the traditional principle that the trial court has broad powers to grant a new trial if for any reason it concludes that the trial has resulted in a miscarriage of justice. *Wright,* supra, § 551.

Federal Rule of Criminal Procedure, Rule 16(a) gives the defendant virtually an absolute right to discovery of his statements. *U.S. v. Projansky,* 1968 44 FRD 550.

The right granted is specious if defendant is unable to have effective use of the disclosure. This is analogous to the right to effective counsel. *Scott v. United States* (CDDC 1970), 427 F2d 609.

1. It was noted at trial that there was a different and better quality to the tapes. The testimony was that they had been "cleaned up".

III

A MOTION FOR NEW TRIAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE WHERE THERE IS A VARIANCE BETWEEN THE INDICTMENT AND THE PROOF WHICH SUBSTANTIALLY AFFECTS AN INDIVIDUAL'S RIGHTS.

The importance of requiring accurate allegations in an indictment was stated in *United States v. Goldstein,* 502 F.2d 526, 528-529, where Judge Weis noted:

> [I]t is the duty of the grand jury to shield a citizen from unfounded charges and to require him to appear in court in defense, only if probable cause has been found by that independent body. Until that prerequisite has been met, the accused is not properly before the court. Thus, a conviction of a defendant cannot be upheld on the basis of facts not found by and perhaps not even presented to the grand jury which indicted him (citation)
>
> This screening process of the grand jury is a substantial benefit to an accused person and in the case of serious crime is constitutionally guaranteed. . . . [The court] must test to see whether there is reasonable assurance from the face and the indictment that the grand jury found probable cause on each of the essential elements which underlie the verdict of the petit jury.
>
> A variance, to be fatal, need not even cause actual surprise.
>
> The issue is not whether counsel is in fact surprised but whether there is a substantial possibility, tested from the perspective of the presumption of innocence, that counsel will be unprepared to meet proof inconsistent with charges contained in the indictment. *U.S. v. Lippi,* 193 F. Supp. 441 (1961).

Even though proof may have shown a scheme to defraud by use of the mails, there was a *fatal* variance where the proof showed a different scheme than that charged in the indictment. Notice is the crucial issue and the only thing the defendant has for this is the indictment. *Jeffers vs. U.S.* C.A. 9th 1968, 392 F 2d 749.

Where an indictment charged a single continuing conspiracy after 1951 a variance showing conspiracies in 1952

and 1955-56 was fatal. *U.S. v. Russano,* C.A.2d, 1958, 257 F 2d 712.

Dated: May 28, 1976.

LAW OFFICES OF GEORGE P. ESHOO

.....

GEORGE P. ESHOO

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Redwood City, CA.
Telephone 364-7030
Attorney for Defendant

In the United States District Court for the Northern District of the State of California

NO. CR 76 22 RFP SJ

United States of America, *Plaintiff*

vs

John Seekins *Defendant*

DECLARATION OF JOHN SEEKINS

I, John Seekins, declare that I am the defendant in the above matter.

That after the trial was completed and waiting for the jury to return with a verdict, I remembered for the first time that there was a connection between Percy Johnson and Jim Powell specifically an individual by the name of Jerry Leyman who had been incarcerated, to the best of my information, with both Jim Powell and Percy Johnson on prior occassions. Mr. Leyman was one of the individuals who was listed as having sold counterfeit bills in the discovery provided by the government. I had reviewed the list before trial but the connection had not clicked until the jury had gone out. That was the first time I told my attorney about this information. After the trial I have received information that there may have been another individual who was connected with Percy Johnson and Jim Powell

and that could have been a potential connection between the two of them and this person was Danny Migdal.

I did not advise my attorney of this fact until this last week after trial.

I reviewed all the tape recordings of the conversations that were provided by the U.S. Attorneys Office and then heard the tape recordings of the same conversations in Court. It is my opinion that the tape recordings offered into evidence in Court sounded different than the tape recordings provided to me by way of discovery order.

I declare under penalty of perjury that the foregoing declaration is true and correct. Executed this 28th day of May, 1976 at Redwood City, California.

/s/ JOHN SEEKINS
John Seekins

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Telephone 364-7030
Attorney for John Seekins

Original Filed May 28, 1976
Clerk, U.S. Dist. Court
San Jose

In the United States District Court for the Northern District of the State of California

NO. CR 76 22 RFP SJ

United States of America, *Plaintiff*

vs

John Seekins *Defendant*

DECLARATION OF GEORGE P. ESHOO

I, George P. Eshoo, declare as follows:

I am the attorney for John Seekins, the above named defendant.

That I was not advised of the fact that there was a connection between Jerry Leyman and Danny Migdal who could have been a potential connection between Percy Johnson and Jim Powell. If I had this information before the trial, I would have attempted to subpoena the individuals to find out if there was a direct connection.

Furthermore, with respect to the tape recordings of conversations that had been provided to me before the trial pursuant to a discovery request, in listening to the tape recordings at the trial I was advised that the tapes at trial were cleaner with respect to background noise than the tape recordings provided to us.

I am not indicating by this that Mr. Carey in any way failed to do what he was required to do. The tapes we had received, other than telephone conversations, were so bad it was nearly impossible to listen to them for the purpose of trial preparation.

Also, pursuant to our request for discovery we were provided with a complete investigative report concerning the alleged transaction between Percy Johnson and John Seekins. All this information indicated Mr. Johnson was alleging that Mr. Seekins had passed the bills at his home in Campbell and that the amount of bills passed was $15,000. Approximately the week before trial Mr. Carey advised me orally that Percy Johnson was changing his story and was indicating that the sale took place in San Francisco without any further specific details of said transaction. All of the prior preparation had been directed towards the allegations that the sale had taken place in Campbell and without the exact details of what Mr. Johnson was alleging had occurred as part of the San Francisco transaction it was difficult for the defense to do any advance preparation other than the alibi defense which was presented at Court. All of this coupled with the fact that the indictment which alleged that the transaction occurred in Campbell on or about November 25 had caused the defense to prepare to defend the case on the government's original theory.

Dated: May 28, 1976.

GEORGE P. ESHOO

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the County of San Mateo. I am over the age of eighteen (18) years, and not a party to the within, above-entitled action. My business address is 500 Allerton Street, Suite 102, Redwood City, California 94063.

On June 8, 1977, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the concerned parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mailbox at Redwood City, California, as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

I, Silvyne Moyce, declare under penalty of perjury that the foregoing is true and correct and that this Proof Of Service By Mail was executed this 8th day of June, 1977, at Redwood City, California.

/s/ SILVYNE MOYCE
Silvyne Moyce